

DOCKET FILED 10/10/97

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FCC 97M-199  
80200

In Matter of ) WT DOCKET NO. 94-147  
 )  
JAMES A. KAY, JR. )  
 )  
Licensee of one hundred fifty two )  
Part 90 licenses in the )  
Los Angeles, California area. )

O R D E R

Issued: December 4, 1997 ; Released: December 8, 1997

This is a ruling on Request For Leave To Appeal, Or, In The Alternative, For Clarification Of Discovery Procedures that was filed on December 1, 1997, by James A. Kay, Jr. ("Kay"). The issue relates to a protective order issued in connection with the deposition of Christopher Killian ("Killian") that is scheduled to be taken next week in Los Angeles. There has been a protective order set in Order FCC 97M-195, released November 26, 1997, which limits Kay's questions on cross-examination to those "which relate to the issues in this case in connection with Kay's cross examination to the questions asked by the Bureau." Id. Kay seeks a broader scope of cross-examination that would inquire into (1) the witness's general credibility and (2) a Petition for Institution of Proceedings ("Petition") against Kay that Killian has filed with the Commission. The Presiding Judge ruled out the use of the Petition by Kay in cross-examining Killian.

Informal telephone discussion of the limits of Kay's questioning was conducted on December 2, 1997. Little could be resolved on this issue. Counsel for Killian and the Bureau filed Oppositions on December 3, 1997, and a prehearing conference was held on-the-record on December 4, 1997, to consider further the scope of Kay's cross-examination at the Killian deposition. Procedurally, counsel for Killian and counsel for the Bureau are correct: The Request fails to comply with the Commission's rules and therefore ought not to be reconsidered. See 47 C.F.R. §1.106(a)(1) (petitions for reconsideration are not to be considered by presiding judges) and 47 C.F.R. §301(b) (an immediate appeal from interlocutory ruling requires showing new and novel question that would result in remand). In addition, Kay has waived his right to oppose the relief sought by Killian because Kay did not file a responsive pleading to the Killian Objection. See 47 C.F.R. §315(b)(2) (party must file responsive pleading within 14 days of the service of the deposition notice). However, the parties are about to engage in two weeks of depositions. It would be in the interest of this case's progress to permit sufficient questioning that might forestall second depositions. In the same context, it was hoped that known rebuttal witnesses could be deposed

in this trip. Therefore, the Presiding Judge revisited the question of a proper scope of Kay's cross-examination of the Bureau's deposition witnesses in light of the concerns of possible harassment raised by Killian.<sup>1</sup>

Under the Federal Rules of Evidence ("FRE"), a party may examine a witness on cross-examination with respect to questions asked on direct and on matters affecting credibility. FRE 611(b). However, that broad authority is further limited by FRE 611(a) (avoid harassment or undue embarrassment), FRE 608(b) (no extrinsic evidence allowed in pursuit of credibility issue) and FRE 403 (even relevant evidence can be excluded for considerations of conserving time). For reasons based on those limitations, there will be no questions permitted to be asked of Killian on the Petition referred to above.

It is noted that the Bureau has offered to cooperate by allowing some questions which go beyond the scope of the direct but would do so on a question by question basis. The Bureau has agreed to not object to questions asked by Kay which are calculated to lead to the discovery of admissible evidence even if such questions do not fall within the Bureau's line of questions on direct. The Bureau seems prepared to allow sufficient leeway that should permit Kay to examine Killian (and other witnesses) in accord with FRE 611(b), including credibility, so long as there is no extrinsic evidence used and provided there is no harassment of the witness and the examination is not unduly prolonged. That is the best resolution that can be made at this time on the scope of deposition cross-examination.

#### Rulings

Accordingly, IT IS ORDERED that the Request For Leave To Appeal, Or, In The Alternative, For Clarification Of Discovery Procedures that was filed by Kay on December 1, 1997, IS DENIED for failure to comply with Commission rules.

IT IS FURTHER ORDERED on revisiting Order 97M-195, that the scope of the cross-examination of Christopher Killian at his deposition shall be limited to questions which are within the scope of the Bureau's direct examination on deposition.

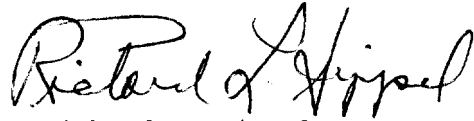
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<sup>1</sup> The Presiding Judge has been hopeful that for the most part these would be depositions of trial witnesses taken for the purpose of pinpointing their testimony which would be locked-in for the hearing. For example, Kay is a competitor of Killian and Kay has known since at least October 1995 that Kay has cooperated with the Bureau. Also, Kay has deposed Killian's wife in a state action and asked for information about Killian contacts with the Commission. Killian is not a recently disclosed candidate for deposition and hearing testimony.

IT IS FURTHER ORDERED that Kay and his counsel shall refrain from employing any harassing questions or methods in the cross-examination of Christopher Killian and all other witnesses in this case.<sup>2</sup>

IT IS FURTHER ORDERED that in all other respects the protective limitations in Order FCC 97M-195 remain unchanged.

FEDERAL COMMUNICATIONS COMMISSION<sup>3</sup>

A handwritten signature in cursive script, reading "Richard L. Sippel".

Richard L. Sippel  
Administrative Law Judge

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<sup>2</sup> A specific prohibition against harassment is deemed appropriate here in view of the history of the past animosity disclosed between Kay and Killian and the significant expense that Killian has expended on legal representation. However, Kay may ask questions in a neutral tone to elicit information on the reasons and scope of Killian's cooperation with the Bureau in the bringing and the prosecution of this case.

<sup>3</sup> Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.